Crown Alliance Marketing (Pte) Ltd v ABV Builders Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–3658 OF 1998
MOHD GHAZALI J
8 JANUARY 2001

Civil Procedure *— Summary judgment — Appeal — Appeal against decision of senior assistant registrar dismissing O 14 application — Whether plaintiff's action premature — Whether triable issues raised — Rules of the High Court 1980 O 14*

The defendant agreed to accept the plaintiff as its nominated sub-contractor to carry out certain works vide a letter of award dated 30 September 1997. The plaintiff claimed that the works were completed in early 1998. The plaintiff brought an action against the defendant claiming for the balance of the outstanding sum and filed an application for a summary judgment. In opposing the plaintiff's application, the defendant contended that the plaintiff's action was premature as the defendant's employer (MTD) had yet to finalize the accounts for payment to be made to the plaintiff. The senior assistant registrar ('the SAR') dismissed the plaintiff's application. The plaintiff appealed. At the appeal the plaintiff adduced new evidence which was available only after its application for summary judgment was dismissed by the SAR. The evidence was in the form of two letters (exh 'CKL-1' to encl 12). The plaintiff contended that the two letters confirmed that the defendant owed the sum as claimed by the plaintiff.

Held, allowing the appeal:

The defendant had made six progressive payments to the plaintiff and there was nothing to show that it was a term of the letter of award that the defendant would have to wait for payment from MTD before making any progress payment to the plaintiff. Furthermore, exh 'CKL-1' was clearly an admission by the defendant of the amount owed by them to the plaintiff. On the whole, the court found that the defendant had no defence to the sum claimed by the plaintiff. There was clearly no issue to be tried (see p 21D, E, H).

[**Bahasa Malaysia summary**

Defendan bersetuju menerima plaintif sebagai subkontraktor calonannya untuk melaksanakan kerja tertentu, melihat surat perlantikan bertarikh 30 September 1997. Plaintif menuntut bahawa kerja tersebut telahpun siap pada awal tahun 1998. Plaintif membawa satu tindakan terhadap defendan untuk menuntut baki jumlah yang belum dijelaskan dan memfailkan satu permohonan untuk penghakiman ringkas. Dalam menentang permohonan plaintif, defendan berhujah bahawa tindakan plaintif belum sampai waktu

kerana majikan defendan (MTD) belum lagi menyempurnakan akaun bayaran kepada plaintif. Penolong kanan pendaftar ('PKP') menolak permohonan plaintif. Plaintif tersebut merayu. Sewaktu rayuan, plaintif mengemukakan keterangan baru yang wujud hanya setelah permohonan untuk penghakiman ringkasnya ditolak oleh PKP. Keterangan tersebut berada dalam bentuk dua pucuk surat (lampiran CKL-1 ke lampiran 12). Plaintif berhujah bahawa dua pucuk surat tersebut mengesahkan bahawa defendan belum menjelaskan jumlah yang terhutang seperti yang didakwa oleh plaintif.

Diputuskan, membenarkan rayuan tersebut:

Defendan telah membuat enam bayaran kemajuan kepada plaintif dan tiada bukti yang menunjukkan bahawa ia satu terma surat perlantikan bahawa defendan haruslah menanti bayaran dari MTD sebelum membuat apa-apa bayaran kemajuan kepada plaintif. Selain itu, lampiran CKL-1 jelas merupakan satu perakuan oleh defendan mengenai jumlah yang dihutang oleh mereka kepada plaintif. Pada keseluruhannya mahkamah mendapati bahawa defendan tiada pembelaan terhadap jumlah yang dituntut oleh plaintif. Jelasnya tiada isu untuk diperbicarakan (lihat ms 21D, E, H).]

Notes

For cases on summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4372–4478.

Cases referred to

Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)
Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, 56 r 1(3A)

WM Lee (*MF Wong* with him) (*Shook Lin & Bok*) for the plaintiff.
G Navamalar (*Siva, Ram & Assoc*) for the defendant.

Mohd Ghazali J. : This is an appeal by the plaintiff to the judge in chambers against the decision of the senior assistant registrar ('SAR'), who on 30 September 1999 dismissed its application to enter summary judgment against the defendant pursuant to O 14 of the Rules of the High Court 1980 ('the RHC'). I allowed the appeal against that decision, and the defendant has appealed to the Court of Appeal.

It is the plaintiff's case that vide a letter of award dated 30 September 1997, the defendant agreed to accept the plaintiff as its nominated sub-contractor to carry out certain works, viz, an architectural tunnel cladding in relation to a project for the upgrading of the Kuala Lumpur-Karak

Highway tunnel for the sum of RM1,315,002. Amongst the terms and conditions as found in the letter of award were the following:

(d) Terms of payment shall be by way of monthly progress payments.

(e) Retention — 10% cumulative value of work done for each progress payment up to a maximum value of 5% of sub-contract sum.

(f) Retention sum shall be released on expiration of defect's liability period of 12 months under the main contract.

The plaintiff claimed that the works were completed in early 1998, and by this action the plaintiff is claiming for the balance of the outstanding sum of RM689,251.90 and interest at 8% from the date of the filing of the suit, ie 5 October 1998 until full realization and costs. How the said sum of RM689,251.90 is arrived at is as follows:

Particulars		
Contract amount		RM1,315,002
Retention sum		(RM 65,750.10)
		RM1,249,251.90
Amounts paid		
	RM 200,000	
24/1 /1998	RM 120,000	
13/4/1998	RM 150,000	
21/5/1 998	RM 30,000	
3/6/1998	RM 30,000	
10/7/1 998	RM 30,000	(RM 560,000)
Amount outstanding as at 20/8/1998		RM 689,251.90

The defendant entered appearance on 10 November 1998. On 18 November 1998, the plaintiff filed an application to enter summary judgment against the defendant pursuant to O 14 of the RHC for the said sum of RM689,251.90, and interest at 8% from the date of filing of the action until full realization and costs. It is the plaintiff's case that there is no defence to the action.

In its statement of defence which was filed on 24 November 1998, the defendant explained they were directed by their employer, viz, MTD Construction Sdn Bhd ('MTD') to accept the plaintiff as a nominated sub contractor, and that the contract price of RM1,315,002 was the sum agreed to between MTD and the plaintiff. As a result of that instruction, the defendant issued the said letter of award to the plaintiff. In relation to the above, the defendant admits that the terms of payment for work done by the plaintiff shall be by way of monthly progress payments, but contended that it is MTD who will pay the monthly progress payments to the defendant for work done by the defendant which would include the said works carried out by the plaintiff.

In opposing the plaintiff's application to enter summary judgment for the said sum claimed, the defendant contended that the plaintiff commenced the said works on 18 November 1997, but up to date has failed to send 'a letter of completion and handing over of works' to MTD. Furthermore, MTD has not finalized the accounts for payment to be made to the plaintiff and up to date MTD has not issued a 'taking over certificate'.

They had explained to the plaintiff the above reasons in a letter dated 21 October 1998 which in its original form, inter alia, read:

> Your progress claim dated 20 October 1998 refers.
> We are unable to process your progress claim any further at this moment due to matters which are outstanding as follows:
>
> 1 Your contract sum of RM1,315,002 needs to be formalized as the formal nominated sub-contract agreement between employer, ourselves and yourselves have not been executed.
>
> 2 The sub-contract period for your works were from 24 September 1997 to 23 December 1997. According to our record, you have yet to submit a notification of handing over of your works to us before we can issue to you a taking over certificate.
>
> It is your contractual obligation to submit a proper application for an extension of your completion period until the date you hand over your works to us. Please note that the date of handing over of your works is very important as it will determine the commencement of your 12 months defects liability period of your works.
>
> 3 As the final account for the whole contract works is still pending certification from the employer, we wish to remind you whether you have obtain the final account certification of your sub-contract works.
>
> We reiterate herein that we are unable to process any of your claim at this juncture until the above outstanding matters have been resolved.
>
> Thank you.
>
> Yours faithfully,
>
> ABV Builders Sdn Bhd
> (Signed)
> CHRIS LEONG
> General Manager

In relation to the progress payments amounting to RM560,000 which they have paid to the plaintiff, the defendant explained they had done so to assist the plaintiff as they were suffering from cash flow problems. In conclusion, the defendant contended that the plaintiff's action is premature as MTD has yet to finalize the plaintiff's accounts.

In reply to the above, the plaintiff insisted that they never suffered from any cash flow problems as alleged, and pointed out that the defendant's letter dated 21 October 1998, referred to above, is irrelevant and an 'afterthought' as the defendant had so far made six progressive payments totalling RM560,000.

The SAR dismissed the plaintiff's application. Her minutes show that she was of the view that the facts of the case were not clear. As stated earlier, I had on 22 November 2000 reversed the decision of the SAR and allowed the plaintiff to enter summary judgment on the sum claimed and against that decision the defendant has appealed to the Court of Appeal.

At the appeal before me, the plaintiff, after getting leave from the court pursuant to O 56 r 1(3A) of the RHC, adduced new evidence which was available only on 21 December 1999, ie after its application for summary

judgment was dismissed by the SAR. The evidence is in the form of two letters (exh 'CKL-1', encl 12), the first of which is from the defendant to the plaintiff and the second from the plaintiff to the defendant's auditors, one Hals & Associates, Kuala Lumpur as directed by the defendant. The two letters read:

> CROWN ALLIANCE MARKETING
> 50-A Sungai Kadut
> Street 1
> Singapore 729353
>
> Dear Sirs,
>
> Re ABV BUILDERS SDN BHD
> Please confirm that as at 30 June 1999, the balance of your accounts with us are:
> Deposits held by you: $Nil (A)
> Due to us: Nil (B)
> Due to you: $755,002 (C)
> We would appreciate it if you would return the attached copy of this letter direct to our auditors in the enclosed envelope, signing the copy if you agree with the figures, or stating on the reverse your reasons for disagreement.
>
> No money received or paid by us after the stated date has been taken into account in arriving at the above figures.
> We would be most grateful for your cooperation in this matter.
> Yours faithfully,
> (Signed)

Upon receipt of the above letter, the plaintiff as requested by the defendant responded in writing to the said auditors which was received by the latter on 21 December 1999. That letter read:

> From
> CROWN ALLIANCE MARKETING
> 50-A, Sungai Kadut
> Street 1
> Singapore 729353
>
> Dear Sirs,
>
> Re ABV BUILDERS SDN BHD
>
> We confirm that as at 30 June 1999, the balances of our accounts with the above named are:
> Deposits held by you: $Nil (A)
> Due to us: Nil (B)
> Due to you: $755,002 (C).
> Includes retention sum of RM65,750.01
> Yours faithfully,

It is the plaintiff's contention that the above letters confirm that the defendant is owing the said sum of RM689,251.90 as claimed, and also the said retention sum of RM65,750.10 which they are not claiming in this suit. The total of the two said amounts is RM755,002. In reply to this contention, counsel for the defendant pointed out the plaintiff had not signed the said second letter addressed to Hals & Associates. Basically, the summary judgment procedure is a procedural device available for prompt

and expeditious disposition of an action by the plaintiff without trial when there is no dispute as to fact or law. The jurisdiction can be invoked in cases where there are no triable issues. Thus, a plaintiff would be entitled to obtain summary judgment without trial if he can prove his case clearly. In *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85, the learned FCJ said:

> The purpose of O 14 of the Rules of the Supreme Court 1957 is to enable the plaintiff to obtain summary judgment without trial if he can prove his case clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried, final judgment should be allowed.

Has the plaintiff in the instant case established a prima facie case against the defendant? It is my finding that the answer is in the positive. It is not disputed that the defendant has issued the said letter of award to the plaintiff. The plaintiff has carried out the said works and the defendant, in relation to the said works, has made six progressive payments to the plaintiff totalling RM560,000, the last payment being on 10 July 1998. The plaintiff has confirmed in writing on 21 December 1999 to the defendant's auditors, as requested, that as at 30 June 1999, the sum due from the defendant to the plaintiff is RM755,002 inclusive of the said retention sum. The six progress payments were made by the defendant to the plaintiff, and there is nothing to show that it was a term of the said letter of award that the defendant would have to wait for payment from MTD before making any progress payment to the plaintiff as suggested by the defendant. The defendant's said letter dated 21 October 1998, to me, does not seem to assist them in opposing this application to enter summary judgment. Furthermore exh 'CKL-1' to encl 12, ie the two letters discussed earlier is clearly an admission by the defendant of the amount owed by them to the plaintiff. In the first letter, the defendant requested that the plaintiff confirm that the said sum due from them to the plaintiff is RM755,002 and the plaintiff has replied to that letter confirming that that is the sum due to and stating therein that the sum is inclusive of the retention sum of RM65,750.10. If that is not an admission, I do know what is. In *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168, Raja Azlan Shah J (as His Majesty then was) said (at p 171):

> It is I think right that an order under RSC O 14 should be made only if the court thinks it is a plain case and ought not to go for trial. If one simply has a short matter of construction with a few documents, the court on summary judgment should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

On the whole, I am of the view that the defendant has no defence to the sum of RM689,251.90 as claimed by the plaintiff. The defendant has not even disputed that sum as at 21 December 1999, as can be seen from the two said letters (exh 'CKL-1' to encl 12), ie after the date of the filing of the suit. There is clearly no issue to be tried and that being the case, I would allow this appeal with costs and order that the plaintiff's application to enter summary judgment against the defendant for the sum of RM689,251.10

and interest at the rate of 8%pa from the date of filing of this suit, and costs be allowed.

Appeal allowed.

Reported by Jafisah Jaafar